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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-814

CHRISTOPHER P. McCARTHY
Petitioner,

vs.

AMERICAN RED BALL TRANSIT CO., INC.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Christopher P. McCarthy
3645 Glenn Drive, S.E.
Grand Rapids, Michigan 49506
Petitioner.

Sheehan, Phinney, Bass & Green and G. Mitchell Eckel III
1 Hampshire Plaza
Manchester, New Hampshire 03101,
Counsel on whom Service made.

In the Supreme Court of the United States

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CHRISTOPHER P. McCARTHY
Petitioner,
vs.
AMERICAN RED BALL TRANSIT CO., INC.
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner, Christopher P. McCarthy, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Hampshire be granted.

OPINIONS BELOW

The opinion of the Supreme Court of the State of New Hampshire was entered on July 30, 1974, No. 6777, granting summary judgment for respondent and is attached to this Petition as Appendix A.

The opinion of the Superior Court of Hillsborough County, Manchester, New Hampshire was entered on June 15, 1972, No. 24547, by the Honorable J. Batchelder, Superior Court Judge, denying Respondent's motion for summary judgment, and on June 15, 1972 granted petitioner's motion for summary judgment and is attached to this Petition as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3), concerning Federal Statutes of an Agency of the United States Government, the Interstate Commerce Com-

mission (9 C.F.R. Sec. 1322.1). A final judgment was rendered by a highest State Court concerning laws of the United States. Differing interpretations have been made in many States on this law and the Supreme Court of the United States should resolve this issue. The judgment sought to be reviewed was made by the New Hampshire State Supreme Court on July 30, 1974, No. 6777. On October 28, 1974, Mr. Justice Brennan, Circuit Justice for New Hampshire entered an order, No. A-338, granting an extension of time in which to file petition for writ of certiorari up to and including December 27, 1974.

STATUTES INVOLVED

28 U.S.C. Sec. 1257(3). Concerning regulations of a Federal Agency of the United States Government.

QUESTIONS PRESENTED

In particular, the questions presented for review by the United States Supreme Court are:

1. Whether the Supreme Court of the State of New Hampshire erred in holding that the petitioner, Christopher P. McCarthy, was liable simply because he accepted his household goods as consignee while not taking into consideration a forgery; a violation of the Rules and Regulations of a Federal Agency of the United States Government, the Interstate Commerce Commission; equal protection for all individuals under the Constitution; and finally not taking into consideration high court decisions of other courts in the United States who ruled contrary to the decision of the Supreme Court of New Hampshire.

STATEMENT OF THE CASE

The following facts are undisputed. Prior to June 17, 1969, petitioner, Christopher P. McCarthy, resided in Lake Forest, Illinois, and was employed by Randolph Manufacturing Company ("Randolph"). Randolph transferred petitioner to the New England area and agreed to pay his moving expenses from Lake Forest to his new home in Bedford, New Hampshire.

American Red Ball accepted a purchase order from Randolph on their credit and agreed to move petitioner's household goods. Prior to the movement of the goods from Lake Forest the operator of Red Ball's moving van presented to petitioner, Christopher P. McCarthy a bill of lading and freight bill which indicated under "Billing Information" that the charge was to be made to "Randolph". Red Ball's operator insisted that petitioner sign the bill of lading and explained the signature was required only to give the mover authority to take the goods and if stopped on the highway could prove he was not stealing the goods. Red Ball's operator, nor anyone else in the Red Ball organization, gave no indication to petitioner that by signing the bill of lading he was agreeing to be liable for the moving charges. During the unloading of the goods in Bedford, New Hampshire Red Ball's van operator requested petitioner to sign the bill of lading again to indicate that the goods were received in good condition. Petitioner agreed to sign provided that certain exceptions to the claim of "good condition" were noted. When this was done petitioner signed. At that time, neither the van operator nor anyone else in the Red Ball organization indicated to the petitioner that by signing he was agreeing to be liable for moving charges and did not call to petitioner's attention any part of the bill of lading which might have shown this statement.

On May 1, 1970 a certified letter was received by petitioner from L. W. Cherry, Accounts Manager, for American Red Ball Transit Co., Inc. stating in pertinent part "We fully realize that this knowledge of your legal obligation may come to you unexpectedly — One of the contract terms of the applicable tariff which is printed on the back of all shipping documents states in Section 3, in part: Shipper shall: (a) be liable for any and all charges applicable under carrier's tariffs, and pay therefor as provided in said tariffs. . . " This is a clear acknowledgment of the fact that American Red Ball Transit Co., Inc. did not indicate to petitioner this fact. This is clearly in violation of the ICC Regulations (9 C.F.R. Sec. 1322.1) and is a concealment of facts. This is also a violation of my

constitutional rights.

On August 6, 1970 petitioner was served a summons to appear at the Superior Court in Manchester, New Hampshire on the first Tuesday of September 1970. I engaged an attorney to represent me and the case was heard by the Honorable J. Batchelder, Judge of Superior Court, Manchester, New Hampshire, who denied motion for summary judgment for plaintiff and granted motion for summary judgment to Christopher P. McCarthy on the basis of the violation of the Regulations of the Interstate Commerce Commission (9 C.F.R. Sec. 1322.1). This order was entered on June 15, 1972, (Appendix B). Plaintiff appealed to the New Hampshire Supreme Court and in accordance with the appeal schedule, American Red Ball was required to pay $120 for the estimated expenses of transfer of the case to the Supreme Court on or before January 24, 1973. They failed to do this and on March 5, 1973, the Court entered an order dismissing the appeal and giving judgment to Christopher P. McCarthy. Thereafter however, plaintiff filed a motion to set aside the judgment and on April 6, 1973, the Court granted the plaintiff's motion and in effect reinstated the appeal. This I contend is a total disregard and violation of their own Regulations, which violates my rights under the Constitution.

The Supreme Court of the State of New Hampshire granted the motion for Summary Judgment to the Plaintiff on July 30, 1974 (Appendix A) on the basis of the brief of the Plaintiff which stated that I, as consignee, was liable for payment. Plaintiff also stated that their delay in billing Randolph increased the risk of non-payment but that there was no assurance that Randolph would have paid the shipment costs had it been billed earlier. The Chairman of the Board of Randolph, in a signed affidavit, stated that during July and August of 1969 Randolph was meeting its accounts payable.

On August 1, 1974, I received a letter from my then attorney giving me the decision of the New Hampshire Supreme Court and stating that the decision raised the possibility of an appeal

to the United States Supreme Court, but he had very little hope that the Court would even hear the appeal even though there might be merit to the appeal. He also said the costs would be prohibitive. Then on September 12, 1974 he recommended settlement on the amount of money I had placed in escrow. On October 2, 1974 my then attorney sent a check to the attorney for the plaintiff. On December 4, 1974 I called New Hampshire to obtain the necessary papers for my writ of certiorari and was then informed for the first time that my former attorney had agreed to a docket marking in the Superior Court of Manchester, New Hampshire stating no "further action". Up until this telephone call, my former attorney had written on every action that he needed my permission to act. He was wholly unauthorized to make any commitment which would disallow my rights under the Constitution to seek justice up to the Highest Court in our Land.

REASONS FOR GRANTING THE WRIT

1. The Supreme Court of the State of New Hampshire erred in not upholding the Rules and Regulations of a Federal Agency of the United States Government, The Interstate Commerce Commission, which state in pertinent part as follows:

> "Upon taking precautions deemed by them to be sufficient to assure payment of the tariff charges within the credit period herein specified, common carriers by motor vehicle may relinquish possession of freight in advance of the payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay them, such persons herein called shippers, for a period of 7 days excluding Saturdays, Sundays and legal holidays." (9 C.F.R. Sec. 1322.1)

Therefore, Red Ball illegally extended credit to Randolph for a period of at least 49 days beyond the 7 day credit extension allowed by the ICC Regulation. A most important point herein is that the ICC Regulations call the persons who undertake to pay tariff charges the "shippers". Randolph was the only person making this promise. Yet American Red Ball calls the petitioner

the shipper since he signed the bill of lading. If this is correct, and certainly the ICC Regulation says so, then the New Hampshire Supreme Court erred in ruling on me as consignee when the shipper of goods is the consignee. The bill of lading was forged in one place and in my experience as a business executive this voids the document. If so, American Red Ball did not have a legal document showing me as consignee.

2. The Supreme Court of the State of New Hampshire erred in not protecting my rights under the Constitution of the United States by not taking into consideration the fact of this forgery on the bill of lading.

3. The Supreme Court of the State of New Hampshire erred in rendering a decision in conflict with decisions opposite to theirs made in many high courts in other states. Laws should be equal for all. Therefore, this important Federal question should be decided by the United States Supreme Court.

The following are some cases in conflict:

Lyon Van Lines, Inc. vs. Cole
9 Wash. App. 382, 512 P.2d 1108

Consolidated Freightways Corp. of Del. vs. Admiral Corp.
442 F.2d 56, 62 (7th Cir. 1971)

Southern Pacific Transportation Co. vs. Campbell Soup Co.
455 F.2d 1219 (8th Cir. 1972)

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that a writ of certorari be granted to review the questions present herein.

Dated, Grand Rapids, Michigan, December 17, 1974.

Respectfully submitted,

Christopher P. McCarthy,
Petitioner

APPENDIX A

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In Case No. 6777 American Red Ball Transit Co., Inc. vs. McCarthy the court upon July 30, 1974 made the following order:

Exception sustained; plaintiff's motion for summary judgment granted; remanded.

Concord,

July 30, 1974

/s/ George S. Pappagianis,
Clerk

APPENDIX B

CLERK OF SUPERIOR COURT
Hillsborough County
Manchester, New Hampshire 03101

June 16, 1972

No. 24547

AMERICAN RED BALL TRANSIT
COMPANY, INCORPORATED

versus

CHRISTOPHER McCARTHY

Sheehan, Phinney, Bass & Green
Manchester, New Hampshire

Wiggin, Nourie, Sundeen, Pingree & Bigg
Manchester, New Hampshire

Gentlemen:

In the above entitled action the Court (Justice Batchelder) has made the following orders:

"June 15, 1972 Plaintiff's motion for summary judgment denied."

"June 15, 1972 Defendant's motion for summary judgment granted."

Very truly yours,

/S/ Carl O. Randall,
Clerk of Superior Court

COR/idb

APPENDIX C

Hillsborough

No. 6777

AMERICAN RED BALL TRANSIT COMPANY, INC.

v.

CHRISTOPHER P. McCARTHY

July 30, 1974

Sheehan, Phinney, Bass & Green and G. Mitchell Eckel III (Mr. Eckel orally) for the plaintiff.

Wiggin, Nourie, Sundeen, Pingree & Bigg, W. Wright Danenbarger and Jeffrey B. Osburn (Mr. Danenbarger orally) for the defendant.

GRIFFITH, J. This is an action in assumpsit brought by American Red Ball Transit Company, Inc., against defendant, Christopher P. McCarthy, to recover freight, handling and storage charges arising out of an interstate shipment of defendant's household goods on June 17, 1969. After a pretrial hearing, trial without a jury based on motions for summary judgment by both parties, supporting affidavits, the bill of lading, and certain agreed statements of fact resulted in a verdict for defendant. Plaintiff seasonably excepted to the trial court's verdict and all questions of law raised by its exception were reserved and transferred by Batchelder, J.

Prior to June 17, 1969, defendant resided in Lake Forest, Illinois, where he was employed by the Randolph Manufacturing Company. Randolph transferred the defendant to its New England affiliate and agreed with him to pay his moving expenses. Defendant arranged with the plaintiff to have his household goods transported to Bedford, New Hampshire, informing plaintiff that his employer would pay his moving

expenses. Subsequent to these arrangements, Randolph wrote plaintiff authorizing it "to send a 'bill' covering all expenses relative to the moving" of all of defendant's personal effects. Accordingly, plaintiff agreed to bill Randolph and instructed its agent, the Narrod Red Ball Moving Company, that it had authority to send a bill for all moving expenses to the Randolph Manufacturing Company. The goods were shipped under a Combined Uniform Household Goods Bill of Lading and arrived in Bedford, New Hampshire, on June 17, 1969.

The bill of lading indicated that defendant was both the shipper and the consignee to whom the goods were delivered and stated that Randolph was to be billed for the freight charges. While defendant admits to signing the bill of lading in two places, he asserts that the third signature appearing above the term "SHIPPER'S SIGNATURE" is an apparent forgery. He maintains that he did not intend to become liable for the shipment when he signed the bill of lading and that when it was presented to him, both prior to the shipment in Illinois and after the shipment in New Hampshire, none of the terms and conditions on the reverse side of the document were brought to his attention. He claims that prior to the shipment the moving van operator informed him that a signature was required "only to give the mover authority to take the goods so that they wouldn't be guilty of theft," and that after the shipment he was asked to sign merely to acknowledge receipt of the goods.

At some point in time between the original negotiations concerning the shipment and the present proceeding, Randolph went bankrupt. Rather than pursue Randolph in bankruptcy, plaintiff brought this action to recover freight charges from defendant. Defendant successfully argued before the trial court that plaintiff was estopped to recover freight costs from him due to its failure to bill Randolph within the seven days required by Interstate Commerce Act Regulations (49 C.F.R. § 1322.1) then in force. Accordingly, the trial court granted defendant's motion for summary judgment.

Plaintiff argues that the trial court erred in not granting its motion for summary judgment, because even if the trial court

correctly found that defendant did not assume liability for the shipment under the terms of the Combined Uniform Household Goods Bill of Lading and Freight Bill, he became liable for payment as consignee, when he, as owner of the goods, accepted the shipment.

Since this case arises from an interstate shipment of goods the rights and liabilities of the parties are governed by federal law. *Continental Tanners* v. *Gonic Footwear Co.*, 106 N.H. 297, 301, 210 A.2d 480, 483, (1965). While the Supreme Court of the United States has never decided a case involving these facts, in other decisions it has enunciated the general rule that the consignee of an interstate shipment of goods becomes liable for payment of shipping costs when he, as owner of the goods, accepts the shipment from the carrier. *Illinois Steel Co.* v. *B. & O. R. Co.*, 320 U.S. 508, 513 (1944); *Louisville & N. R. Co.* v. *United States*, 267 U.S. 395, 397 (1925); *Louisville & N. R. Co.* v. *Central Iron Co.*, 265 U.S. 59, 70 (1924); *Pittsburgh, C. C. & St. L. R. Co.* v. *Fink*, 250 U.S. 577, 581 (1919). Though it has been stated that the parties to an interstate shipment are free to agree to their own terms subject to the prohibition against unlawful discrimination and the limitations imposed by the bill of lading (*Illinois Steel Co.* v. *B & O. R. Co.*, *supra* at 512), the liability of the consignee arises by implication of law when he, as owner of the goods, accepts the shipment. 4 *Elliott, Railroads* § 2351, at 872, 873-74 (3rd ed. 1922); *Pittsburgh C. C. & St. L. R. Co.* v. *Fink*, *supra* at 581. Therefore, while Randolph's liability for payment of the shipping costs arose from its express promise to pay, defendant's liability arose as a matter of law once he accepted the shipment.

Defendant contends that despite a consignee's liability for payment of freight costs, conduct by a carrier may estop it from collecting freight charges from the consignee. He asserts that plaintiff's failure to bill Randolph within seven days (49 C.F.R. § 1322.1) estops it in this instance. We recently held that the provisions of the Interstate Commerce Act (49 U.S.C. § 323) were designed to prevent discrimination in rates and not to enable a party to avoid payment. *AAA Trucking Corp.* v. *Spherex, Inc.*, 110 N.H. 472, 474, 272 A.2d 594, 595, (1970). We concluded in that case that a delay in billing alone "did not

establish the facts necessary to sustain a finding of estoppel under our law." Id.; see *Director General* v. *McCormack*, 82 N.H. 528, 136 A. 253 (1927). The essential elements of estoppel are as follows: "(1) A representation or a concealment of material facts; (2) the representation must have been made with knowledge of the facts; (3) the party to whom it was made must have been ignorant of the truth of the matter; (4) it must have been made with the intention that the other party should act upon it, and (5) the other party must have been induced to act upon it to his prejudice." *Monadnock School District* v. *Fitzwilliam*, 105 N.H. 487, 491-92, 203 A.2d 46, 49-50 (1964); *Bigwood* v. *Merrimack Village District*, 108 N.H. 83, 87, 229 A.2d 341, 344-45 (1967).

Defendant relies on three recent cases which held that a carrier's conduct estopped it from recovering freight costs from the consignee. *Southern Pac. Transp.* v. *Campbell Soup Co.*, 455 F.2d 1219 (8th Cir. 1972); *Consolidated Freightways Corp.* v. *Admiral Corp.*, 442 F.2d 56 (7th Cir. 1971); *Lyon Van Lines, Inc.* v. *Cole*, 9 Wash. App. 382, 512 P.2d 1108 (1973). The first two of those cases involved double payment situations in which the carrier represented on the bill of lading that the freight charges had been prepaid by the consignor. In reliance upon the carrier's prepayment representation the consignee forwarded the freight charges to the consignor, thinking he was reimbursing him when in fact no prepayment had been made. Subsequently, when the consignor went bankrupt, the carrier sought to recover from the consignee, but was estopped to do so. The facts in those cases would also be sufficient to sustain a finding of estoppel under our law. *Monadnock School District* v. *Fitzwilliam*, 105 N.H. 487, 491-92, 203 A.2d 45, 49-50 (1964). The third case relied on by defendant involved facts almost identical to those in this case, but relied on the two foregoing double payment decisions for its authority. That court stated that "the shipping costs could be considered to be partial compensation to [defendant] for the work he performed . . . and [he] would effectively be making a double payment if he were held liable for shipping costs which he had already earned." *Lyon Van Lines, Inc.* v. *Cole*, 9 Wash. App. 382, 387 n.2, 512 P.2d 1108, 1112 n.2 (1973).

We think that Cole and this case are distinguishable from the double payment cases. *Southern Pac. Transp. Co.* v. *Campbell Soup Co.*, 455 F.2d 1219 (8th Cir. 1972); *Consolidated Freightways Corp.* v. *Admiral Corp.*, 442 F.2d 56 (7th Cir. 1971). We cannot agree that if defendant is held liable for payment, he will in effect be made to pay twice for the shipment. Whether or not Randolph's agreement to pay defendant's moving expenses can be considered compensation for past services, it has no bearing on the shipment agreement. Had Randolph remained solvent, an action by defendant against it could have been brought to recover the full costs of the shipment. While it might be said that plaintiff's delay in billing Randolph increased the risk of non-payment, there is no assurance that Randolph would have paid the shipment costs had it been billed earlier. Thus, it is Randolph's bankruptcy which prevents defendant from realizing the full benefit of his agreement with Randolph and full reimbursement for payment of shipping costs. We are of the opinion that plaintiff cannot be held accountable for any knowledge of Randolph's precarious financial condition at the time Randolph agreed to pay defendant's shipping expenses, in the absence of any assertions to that effect in the affidavit filed in support of the defendant's motion for summary judgment.

While the actions of plaintiff's agent in presenting the bill of lading to defendant are sufficient to support a finding that defendant was not liable for the shipment on the basis of his signatures on the bill of lading, these facts become immaterial in the light of defendant's liability based on his acceptance of the shipment. Nothing in defendant's affidavit establishes any misrepresentation, concealment, reliance, or inducement to act which would support a finding of estoppel against the plaintiff. *Monadnock School District* v. *Fitzwilliam*, 105 N.H. 487, 491-92, 203 A.2d 46, 49-50 (1964). Accordingly, we hold with that line of cases which follows the rule established in *Pittsburgh, C. C. & St. L. R. Co.* v. *Fink*, 250 U.S. 577, 581 (1919). *National Van Lines, Inc.* v. *Herbert*, 81 S.D. 633, 140 N.W.2d 36 (1966); *Lyon Van Lines, Inc.* v. *Ogden*, 503 S.W.2d 632 (Tex Civ. App. 1973).

Defendant's last contention is that he is only liable to the extent that plaintiff is unable to recover from Randolph by filing a claim in bankruptcy. This argument is apparently based on the theory that defendant is only secondarily liable. But, both Randolph and the defendant are primarily liable for payment. While Randolph may be liable to the defendant through a separate agreement, so far as the plaintiff is concerned by obligations of Randolph and of the defendant to it are independent of one another and are both primary. See *Boston & M. R. Co.* v. *Hannaford Bros. Co.*, 144 Me. 305, 317-18, 68 A.2d 1, 7-8 (1949).

Exception sustained; plaintiff's motion for summary judgment granted; remanded.

All concurred.

MICHAEL RODAK, JR., CLE

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

THEODORE R. BOEHM
TERRILL D. ALBRIGHT
Baker & Daniels
810 Fletcher Trust Building
Indianapolis, Indiana 46204

Counsel for Respondent.

Central Publishing Company, Inc., Indianapolis, Ind. 46206

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

This case has been settled and is therefore moot. Petitioner so states at page 5 of his petition. Petitioner apparently contends his attorney was not authorized to terminate this case. Respondent assumes the law of New Hampshire is the same as that of all other states and that as a matter of law an attorney has inherent or apparent authority to settle. In any event, that is a matter of state law and any request for relief is properly addressed to the state courts in the first instance.

The facts establishing mootness are simple:

On July 30, 1974, the New Hampshire Supreme Court remanded the cause to the Hillsborough County Superior Court.

On September 13, 1974, pursuant to the remand, the Hillsborough County Superior Court entered judgment in favor of respondent in the amount of $3,646.48.

On October 22, 1974, petitioner satisfied the judgment by payment to respondent, and respondent executed a release of any further claims. At the same time petitioner and respondent filed a notice with the Hillsborough County Superior Court of the satisfaction of the judgment. That pleading, which was signed by counsel for both parties, reads as follows in its entirety:

> "The parties agree as follows: Judgment for the plaintiff. Judgment satisfied. No further action for the same cause."

On October 23, 1974, the trial court made the following entry of satisfaction of judgment:

> "Judgment for plaintiff, no further action by agreement filed. Judgment satisfied."

If the petitioner wishes to challenge the settlement or the judgment entered by the county trial court, his remedy lies in proceedings within the New Hampshire state judicial system. No direct review by this court is proper. The writ should be denied.

Respectfully submitted,

THEODORE R. BOEHM
TERRILL D. ALBRIGHT
Baker & Daniels
810 Fletcher Trust Building
Indianapolis, Indiana 46204

Counsel for Respondent.